No. 85-722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC. AND OZARK AIR LINES, INC.,
Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

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REPLY BRIEF FOR APPELLANTS

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IN THE

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No. 85-732

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.; FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,
Appellants,

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BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of South Dakota

REPLY BRIEF FOR APPELLANTS

In its brief, South Dakota concedes that "there can be no question" that the code provision here in issue, 49 U.S.C. § 1513(d), was "passed to prevent discrimination in taxation." Br. at 21. Nevertheless, South Dakota argues that the language Congress used in the statute permits the most extreme form of such discrimination—*i.e.*, the taxation of airline flight property and the complete exemption of virtually all non-airline business personalty. The State argues that the phrase "subject to a property tax levy" in the statutory definition of "commercial and industrial property" (the comparison class for purposes of determining whether unlawful discrimination exists) is, in the words of the court below, capable of only one "clear and unambiguous" interpretation. According to the State, the "subject to" phrase refers to property that is not only *capable of* being taxed but is *actually being*

taxed, so that the State may tax air carrier property at any rate it desires as long as non-air carrier commercial and industrial property is wholly exempt from taxation.

South Dakota's assumption that the term "subject to a property tax levy" is unambiguous and capable of only one interpretation is simply incorrect. The State would have the phrase read as referring to property "being taxed," or property "subjected to" a property tax levy. Instead, however, Congress used the words "subject to" which are more naturally read as referring to something which *may* occur. When something is "subject to change" it is capable of being changed; when it is "subject to" a tax levy it is capable of having such levy imposed. This is illustrated by cases arising under the Internal Revenue Code, where courts have read "subject to taxation" as meaning "capable of being taxed" in opinions that also underscore the importance of considering the congressional purpose.[1]

[1] In A.O. Smith Corp. v. United States, 691 F.2d 1220 (7th Cir. 1982), the issue centered on section 6154(a) of the Code which requires every corporation "subject to taxation under Section 11" to pay a quarterly estimated tax. 26 U.S.C. § 6154(a) (1980). Section 11 is the general corporate tax provision. 26 U.S.C. § 11 (1984 and Supp. 1986). Taxpayer challenged the application of the estimated tax provision to the recapture of investment tax credits under section 47, 26 U.S.C. § 47 (1984 and Supp. 1986), arguing that recapture was not provided for in section 11, hence it was not "subject to taxation" under that section and in fact its tax under section 11 was zero. Rejecting such a narrow definition of the "subject to taxation" language, the court stated it could not "imagine a theory on which Congress could have desired assymetrical treatment" of recaptured credits depending on whether taxpayer was directly subject to a tax under section 11 or to recapture under section 47. *Id.* at 1221. Similar results have been reached in applying the Section 7701(a)(14) definition of taxpayer as "any person subject to any internal revenue tax." 26 U.S.C. § 7701(a)(14) (1967 and Supp. 1986); *see* Thompson v. United States, 332 F.2d 657, 662 n.12 (5th Cir. 1964) ("Status as one subject to a tax need not necessarily require unquestioned liability for it. That might turn on intricate legal and factual questions, *e.g.*, status as a charitable trust, etc.").

In the decision below, the South Dakota Supreme Court need not have looked beyond the language of antecedent enactments governing railroads and motor carriers to conclude that in this case "subject to" tax could mean "capable of" being taxed. In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (as recodified at 49 U.S.C. § 11503 (Supp. 1985)), and the almost identical motor carrier provisions of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31(a), 94 Stat. 793, 823 (codified as amended at 49 U.S.C. § 11503a (Supp. 1985)), Congress used the phrase "subject to a property tax levy" interchangeably with the phrase "taxable property." Both the rail and motor carrier provisions, like 49 U.S.C. § 1513(d), prohibit assessment discrimination and rate discrimination. They further provide that if an adequate sales assessment ratio study is not available for commercial and industrial property, the court may make comparisons, for both assessment and rate purposes, between transportation property and all other property, not just commercial and industrial property. 49 U.S.C. §§ 11503(c), 11503a(c). Significantly, these provisions refer to such other property both as "all other property . . . subject to a property tax lavy" and as "taxable property" in the taxing district.[2] The dictionary definition of

[2] Section 306(2)(e) of the 4-R Act reads:

> (e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of *all other property* in the assessment

"taxable" is "capable of being taxed."[3] The use of the term "taxable" interchangeably with "subject to a property tax levy" in a way that suggests that Congress saw them as equivalents clearly does not support the State's argument that the "subject to" phrase is capable of only its interpretation.[4]

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jurisdiction in which is included such taxing district and *subject to a property tax levy* bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to *taxable property* in the taxing district. (Emphasis added.)

In 1978, Congress recodified Title 49. This recodification of Title 49 in 1978 altered the language of section 306 but the changes were not intended to affect the meaning of the Act. *See* Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1337, 1466. The full text of § 306 appears as Appendix C to the Brief of *Amici* Railway Progress Institute and Association of American Railroads.

[3] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2345 (1976).

[4] This is true with respect to the air carrier legislation even though the reference to "taxable" does not appear in § 1513(d). That section does not include any of the incidental provisions which appear in the rail and motor carrier versions. The legislative history gives no explanation, although it may be significant that the bill proposed by the airlines did not contain them. *See Effects of Airline Deregulation; and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings on H.R. 4065 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 186, 244-45 (1981) (statement of Paul R. Ignatius, President and Chief Executive Officer, Air Transport Association of America). In any event it is clear that Congress had in mind no less protection against discrimination for the airlines than for the carriers whose legislation contained the extra provisions. The Conference Report adopting the air carrier provision stated:

> The provision makes current law which prohibits the assessment, levying or collecting of taxes on motor carrier property in a manner different from that of other commercial and industrial property, applicable to air carriers.

H.R. REP. NO. 760, 97th Cong., 2d Sess. 722, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1190, 1484.

The State, however, argues that commercial and industrial property by its nature is capable of being taxed and that petitioners' position must therefore be rejected because it would render the phrase "subject to a property tax levy" surplusage, in contravention of familiar canons of construction. Br. at 31. This argument is also incorrect because there are significant categories of commercial and industrial property that are *not* capable of being taxed by states, such as property that is not taxable under constitutional principles or federal statutes and is nevertheless devoted to a commercial or industrial use.[5] It also appears that property which has been traditionally nontaxable under state law was intended to be covered by the "subject to" phrase. Such non-taxable property could include commercially used property of traditionally exempt organizations such as libraries, universities, art galleries, etc. which states choose not to tax.[6]

Given the different possible readings of "subject to a property tax levy," resort to legislative history is inescapable. The South Dakota Supreme Court wholly

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[5] Examples include power plants operated by federal corporations like the Tennessee Valley Authority, railroad rolling stock owned by the National Railroad Passenger Corporation, 45 U.S.C. § 546b (Supp. 1986), post exchanges on military bases, national park lands leased to private interests for commercial use, government owned machine tools leased to industry for commercial use, and property related to commercial activities on Indian reservations. *Cf.* White Mountain Apace Tribe v. Bracker, 448 U.S. 136 (1980); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976).

[6] For example, Idaho exempts property entirely from real estate taxes "if the value of the part used for commercial purposes is determined to be three percent (3%) or less than the value of the entirety." IDAHO CODE § 63-105C (1976). In Indiana the test employed is whether the "dominant use" of the property has been for purposes that are exempt. Sahara Grotto and Styx, Inc. v. State Board of Tax Commissioners, 147 Ind. App. 471, 479, 261 N.E.2d 873, 878 (1970).

ignored that legislative history, preferring instead to rely on a tangential Eighth Circuit decision.[7] In its brief, the State makes some reference to the legislative history but can point to nothing in that history to support the State's assertion that Congress intended to permit discrimination by blanket exemption of non-air carrier business property.

The State's principal argument seems to be that the shift in language in earlier versions of the legislation from "all other property" as the comparison class to "commercial and industrial property" shows an intent to allow states discretion to do what South Dakota has done. We fail to see how that conclusion can be drawn. Congress' "zeroing in," as the State describes it, on business property as the real source of concern about discrimination scarcely supports the notion that Congress thereby

[7] Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), involved discriminatory taxation of railroad property by North Dakota under § 306 of the 4-R Act. The state had argued, as South Dakota does here, that it was free to exempt non-carrier property without violating the statute. The lower court accepted the State's argument but found the tax invalid under a catch-all provision in § 306(1)(d) of the statute which prohibits "any other tax which results in discriminatory treatment of a common carrier by railroad." *Id.* at 209. The Court of Appeals in affirming did not specifically examine the question of a state's right to exempt non-carrier property in the absence of a catch-all provision. (The catch-all language does not appear in the air carrier statute presumably because, as pointed out in our opening brief (pp. 27-28), 49 U.S.C. § 1513(a) already prohibited the kind of gross receipts tax at which the railroad provision was aimed.)

The State's brief mentions several other lower court decisions and one court of appeals decision which, like the South Dakota Supreme Court, ignore the purpose and legislative history of § 1513(d) and thus arrive at the same erroneous conclusion. *E.g.*, ACF Industries, Inc. v. Arizona, 714 F.2d 93 (9th Cir. 1983) (discussed in our opening brief at 25 n.29).

intended to make it easier for states to *exclude* business property from the comparison class.[8]

By contrast, the legislative history in support of Appellants' interpretation is powerful and consistent, reflecting if anything a stronger intent to prohibit all forms of discrimination at the time Congress finally acted than in earlier Congresses. That intent is best illustrated by the House's specific rejection in floor debate on the 4-R Act[9] of a Senate amendment (the "Tennessee Amendment") which would have made the statute inapplicable to any state which "has in effect a provision of its constitution (or an amendment thereto) which provides for the reasonable classification of property for State purposes." 121 CONG. REC. 41400 (1975).

The Tennessee constitutional provision at which the Amendment was aimed called for the assessment of railroad and other public utility property at 55% of true value, industrial and commercial property at 40% and residential and farm at 25%. Presumably these were

[8] For example, the following statement on the floor by Congressman Kuykendall during House consideration of the legislation in 1974:

> There has been a great deal said about the State tax discrimination part of this bill. All this bill attempts to do is simply to tell each State involved in taxation of interstate railroads that that State may not tax the property of a railroad any more than they tax the property of General Motors or United States Steel.

120 CONG. REC. 38733 (1974). The personal property of General Motors or United States Steel would be exempt from taxation under S.D. CODIFIED LAWS ANN. § 10-4-6.1 (1982).

[9] *See* 121 CONG. REC. 41400-41401 (1975). Congressman Adams, a principal sponsor of anti-discrimination legislation, concluded his remarks in opposition to the Amendment as follows: "[T]he whole purpose of this particular provision was to say that the States through which transportation companies are passing shall tax them fairly with their other items." *Id.* at 41401 (statement of Rep. Adams).

regarded as "reasonable" classifications under the proposed amendment. The Conference nevertheless upheld the action of the House.[10] This rejection by Congress of "reasonable" discriminatory classifications with respect to railroads—an expression of intent equally applicable to airlines[11]—clearly leaves no room for states to evade section 1513(d) through classifications as extreme as South Dakota's scheme of total discrimination against air carrier flight property.

For the foregoing reasons, the judgment of the Supreme Court of South Dakota upholding that State's airline flight property tax must be reversed.

Respectfully submitted,

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[10] S. REP. No. 595, 94th Cong., 2d Sess. 166, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 148, 130-81.

[11] While section 1513(d) differs from the railroad and motor carrier legislation in various incidental respects, Congress has made clear that its overall intent was the same. *See supra* note 4. The record shows in fact that the airlines, in making their case for similar legislation, called Congress' attention to the kind of state constitutional discrimination the Tennessee Amendment would have allowed. Appellants' Brief at 20-21.

APPENDIX

APPENDIX

The following changes have occurred since the changes in Appellants' corporate affiliations were listed at page A-18 of Appellants' Brief:

A. Appellant Western Air Lines, Inc. has agreed to be acquired by Delta Air Lines, Inc.

B. NWA, Inc., parent of Northwest Airlines, Inc., has completed its acquisition of Appellant Republic Airlines, Inc.

C. People Express Airlines, Inc., parent of Appellant Frontier Airlines, Inc., has agreed to be acquired by Texas Air Corp., parent of Continental Airlines Corp. and Eastern Air Lines, Inc.

D. Trans World Airlines, Inc., has completed its acquisition of Ozark Holdings, Inc., parent of Appellant Ozark Air Lines, Inc.